the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-113

May 1982

Table of Contents

Superfund: The Army as Protector of the Environment*

by Barry N. Breen, Assistant to the General Counsel, Office of the Secretary of the Army, Washington, D.C.

Lawyers at installations have an important new opportunity to assist the Army in aggressively protecting the environment and natural resources. The new "Superfund" legislation and delegations of authority under it make the Army a potential leader in environmental cleanup efforts.

What is "Superfund"?

On December 3, 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] Signed into law on December 11, 1980[2] CERCLA is environmental legislation enacted to address "the tragic consequences of improperly, negligently, and recklessly hazard-

* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of the Army or any other government agency.

[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980), to be codified at 42 U.S.C. §§ 9601, ff (hereinafter cited as CERCLA). *See* 1980 U.S. Code Cong. & Ad. News 6119. All statutory citations are to this Act, unless otherwise indicated.

[2] 16 Weekly Comp. of Pres. Doc. 2797 (Dec. 11, 1980).

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO ATTENTION OF
JACS-GC

APR 16 1982

SUBJECT: Processing Medical Malpractice Claims - Policy Letter 82-3

ALL JUDGE ADVOCATES

1. Records of the U.S. Army Claims Service disclose that medical malpractice claims have increased substantially. Significant efforts have been directed towards the development of effective procedures controlling the investigation and processing of incidents that generate these type claims. Total compliance with those procedures is vitally important to the success of the Army Claims program.

2. The informed disposition of medical malpractice claims, with the required protection of the Government's financial interest, can best be accomplished by implementation of an intelligent, practical risk management program. Experience has shown that the most successful programs are those where the local staff judge advocate becomes personally involved; expresses his support for the program to the medical commander; insures prompt and complete investigation of incidents, whether or not a claim has been filed; and reviews, on a continuing basis, important claims incidents as they occur. The responsibility for handling complex, serious medical malpractice claims and evaluating these situations requires competent, experienced attorneys to conduct the investigation and process the claim. I wish to emphasize that such assignment should receive priority treatment. I am advised that this is not being complied with in many instances.

3. The Surgeon General of the Army has expressed his deep interest and continued support in effecting all practical improvements and efforts to develop the best possible solution to our mutual problem.

4. Your medical malpractice claims program will be an item of interest during Article 6, UCMJ, inspections.

Hugh R. Overholt

HUCH R. OVERHOLT
Major General, USA
Acting The Judge Advocate General

ous waste disposal practices known as the 'inactive hazardous waste site problem.'"[3]

CERCLA established the Hazardous Substance Response Trust Fund,[4] generally shortened to "Superfund." Because the Superfund is central to the operations of CERCLA, the entire statute is frequently referred to as "Superfund."

The Superfund Act is aimed at cleaning up "hazardous wastes." These wastes are broadly defined to include chemicals identified under other environmental statutes[5] and pollutants which "when released into the environment may present substantial danger to the public health or welfare or the environment."[6] Perhaps the most widely known example of hazardous waste pollution—and a case cited repeatedly by Congress in enacting Superfund—is that of Love Canal, New York. There, pollution dumped and buried in the ground is alleged to be responsible for birth defects, miscarriages, and more. Two hundred thirty families have been evacuated from their homes, and cleanup costs have already exceeded $27 million.[7] Also motivating Congress was the 1979 Environmental Protection Agency (EPA) estimate that there are up to 30,000 to 50,000 hazardous waste dump sites in the United States, of which between 1,200 to 2,000 present a serious public health risk.[8]

The Superfund account is to finance the cleanup of these sites, and is expected to collect $1.6 billion over the next five years.[9] Superfund itself is financed principally by newly imposed taxes on petroleum and chemicals, amounts recovered against polluters, and direct appropriations.[10] The fund is administered by EPA and the Treasury Department.[11]

---

[3] H. Rep. No. 96-1016, Part 1, 96th Cong., 2d Sess. 17, *reprinted in* 198 U.S. Code Cong. & Ad. News 6120.

[4] CERCLA, *supra* note 1, § 221.

[5] The Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Clean Air Act, and the Toxic Substances Control Act. *See supra* note 1, § 101(14).

[6] CERCLA, *supra* note 1, § 102(a).

[7] H. Rep. No. 96-1016, *supra* note 3, at 18, ff.

[8] *Id.*

[9] CERCLA, *supra* note 1, §§ 111, 221; "Superfund: No Super Record Yet," Washington Post, March 23, 1982.

[10] CERCLA, *supra* note 1, § 221.

[11] CERCLA, *supra* note 1, §§ 111, 221. The President is designated to spend funds under § 111(a), and he has delegated those responsibilities to the EPA Administrator. Exec. Order No. 12316, (Responses to Environmental Damage 46 Fed. Reg. 42,237 § 7 (1981)).

The Army Lawyer (ISSN 0364-1287)

The Army Lawyer is published monthly by the Judge Advocate General's School. Articles represent the opinions of the authors and do not necessary reflect the views of the Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Footnotes, if included, should be typed on a separate sheet. Articles should allow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is $19.00 a year, $2.50 a single copy, for domestic and APO addresses; $23.75 a year, $3.15 a single copy, for foreign addresses.

Issues may be cited *as The Army Lawyer*, [date], at [page number].

Although some commentators have emphasized the establishment of the trust fund as the main purpose of the Superfund Act,[12] of more immediate interest to most Army attorneys are the civil liability provisions.

New Causes of Action Under The Superfund, Act

In addition to the Superfund account created, the Act creates broad new civil causes of action against polluters. Under § 107, hazardous waste polluters are liable for "damages for injury to, destruction of, or loss of natural resources." The standard is strict liability, save only for three listed defenses: act of God, act of war, and certain acts or omissions of third parties.[13] Generally, liability may reach $50,000,000 plus the cost of environmental response,[14] to include remedies up to total clean-up of the pollution.[15] If the pollution was willful, or a violation of applicable standards or regulations with knowledge or privity, the liability ceiling is waived.[16]

Additionally, § 107(f) of the Superfund Act creates a new cause of action in the federal and state governments to sue for "damages for injury to, destruction of, or loss of natural resources."[17] The pollution or the damage it caused must have occurred after December 11, 1980, and not in compliance with certain permits or licences. Sums collected are to be used to restore, rehabilitate, or replace damaged natural resources. The statute provides that, in the case of the federal government, the President shall act on behalf of the public as trustee of damaged natural resources.[18]

Presidential Authority has been Delegated

On August 14, 1981, President Reagan signed Executive Order No. 12316, "Responses to Environmental Damage."[19] This Executive Order delegates much of the President's authority under the Superfund Act. Section 1(d) requires that the Secretary of Defense be designated as a federal trustee for natural resources, and EPA has proposed implementing regulations in the "National Contingency Plan."[20] Section 4 (d) delegates to the trustees the President's authority under the civil liability enforcement section of the Superfund Act.[21]

In turn, the Secretary of Defense has subdelegated his authority to the secretaries of the military departments.[22] The Secretary of

---

[12] *See, e.g.*, R. Zener, "A Summary of Superfund," *Envt'l Reg. Analyst*, Feb 1981, at 13; U.S. Council of Environment Quality, *Environmental Quality 1980* (eleventh annual report) 222.

[13] CERCLA, *supra* note 1, § 107(b). Although the Act does not explicitly refer to strict liability, § 101(32) states "'liable' or 'liability' under this title should be construed to be the standard of liability which obtains under Section 311 of the Federal Water Pollution Control Act." Several cases have found this to be strict liability. *See* 1 Chem & Radiation Waste Lit. Rep. 254, (January 1981), and cases cited therein. Moreover, the Superfund scheme established is functionally one of strict liability with the exceptions noted in the text.

[14] CERCLA, *supra* note 1, § 107(c)(1). Separate liability ceilings are set for vessels, motor vehicles, aircraft, pipelines, and rolling stock. The general ceiling is applicable to factories, storage plants, and similar facilities.

[15] CERCLA, *supra* note 1, §§ 101(23)-101(25).

[16] CERCLA, *supra* note 1, § 107(c)(2).

[17] *See also* R. Zener, "A Summary of Superfund," *Envt'l Reg. Analyst*, Feb 1981, at 15.

[18] CERCLA, *supra* note 1, § 107(f), § 107(j).

[19] 46 Fed. Reg. 42,237 (1981).

[20] The regulations are in the proposed "National Oil and Hazardous Substances Pollution Contingency Plan," 47 Fed. Reg. 10,971, 10,995 (1982) (to be codified in 40 C.F.R., Part 300, § 300.71).

[21] CERCLA, *supra* note 1, § 107(f).

[22] Memorandum for the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics), Subject: Delegation of Authority, Nov. 2, 1981. The Memorandum reads in full:

"I hereby delegate the authority vested in the Secretary of Defense by the President of the United States in Executive Order 12316, August 14, 1981, "Responses to Environmental Damage," to the Secretaries of the Army, Navy, and Air Force. The Assistant Secretary of Defense (Manpower, Reserve Affairs and Lo-

the Army assigned responsibility within the Army to the Assistant Secretary of the Army (Installations, Logistics and Financial Management), whose Deputy for Environment, Safety and Occupational Health is to serve as the Army point of contact and special assistant for Superfund and Executive Order 12316.[23]

An Opportunity for the Army

This new pollution enforcement authority provides the Army a bold opportunity to protect natural resources.

Public opinion polls are clear that the American public supports environmental activism, even at a high cost. In answer to the question "Do you favor or oppose relaxing pollution standards affecting human health if the costs are too high?," a 1981 Harris Poll found 65% of the respondents opposed relaxing standards while 32% favored relaxation.[24] Similarly, in a

---

gistics) is assigned oversight responsibility within the DOD with respect to the Act and the Executive Order and may issue policy guidance and instructions to the military departments, as necessary, to ensure the provisions of Executive Order 12316 are appropriately implemented within the Department of De- fense.

"The right to cancel this delegation at any time is reserved, and on such cancellation the authority will revert to the Secretary of Defense."

"/s/ Caspar W. Weinberger"

An intriguing, though perhaps academic, question is whether Secretary Weinberger is able to delegate his responsibilities as a Federal trustee for natural resources to the service secretaries. Executive Order 12316 includes in § 8(f) the proviso: "Certain functions vested in the President by the Act which have been delegated or assigned by this Order may be redelegated to the head of any agency with his consent; those functions which may be redelegated are those set forth in Sections 2, 3, 4(b), 4(c), and 6(c) of this Order." This clause does not include among permissible sections for redelegation Sections 1 and 4(d), those relevant to Federal trusteeship and civil liability.

There are two possible interpretations. First, the President could have meant that original delegatees such as the Secretary of Defense would not be permitted to delegate unlisted functions to subordinates. In this case, however, the President would have been clearer had he used the verb "subdelegate" rather than "redelegate." The second possibility is that the President meant that original delegatees would not be permitted to delegate unlisted functions to officials *not* subordinates, i.e., those in other government agencies. For example, the EPA Administrator would not be permitted to delegate her functions to officials in the Interior Department, Agriculture Department, etc. In this case, however, the President would have been clearer had he used the verb "transfer" rather than "redelegate."

If the purpose of the limitation on delegation is to ensure that decisions are made at a particular poilitical level, then the first interpretation is the more reasonable. If the purpose of the limitation is to preserve the areas of responsibility among different executive agencies, then the second interpretation is more reasonable.

Since these two possible goals are not mutually exclusive, it is possible the President meant to exclude both "subdelegations" and "transfers."

This issue of interpretation is perhaps academic. The Secretary of Defense has not attempted a delegation to anyone outside the Defense Department. Thus, there is no "transfer." Further, the staffs of service secretaries can coordinate closely with the staff of the Secretary of Defense. In this way, the Office of the Secretary of Defense can monitor trusteeship actions to ensure compliance with policies desired. This is the arrangement which seems to have been contemplated by Secretary Zeinberger when he included in his delegation memorandum the provision for "oversight responsibility" and "policy guidance and instructions" by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). This is also the arrangement which seems to have been envisioned by EPA in its proposed "National Oil and Hazardous Substances Pollution Contingency Plan," note 20 *supra*, when it specifies the trustee as "the head of the Federal land managing agency, or the head of any other single entity designated by it to act as trustee for a specific resource." 47 Fed. Reg. 10,995.

[23] Memorandum for Assistant Secretary of the Army (Installations, Logistics and Financial Management), Subject: Response to Environmental Damage, Dec. 29, 1981.

[24] Testimony of Louis Harris Before the Subcommittee on Health and the Environment, House Committee on Energy and Commerce, October 15, 1981 (printed testimony distributed at hearing on Clean Air Act amendments). The complete question asked was "The Clean Air Act does not permit the consideration of costs when setting standards for the protection of human health. The Reagan Administration is considering asking Congress to require that pollution standards designed to protect human health be relaxed if the costs

New York Times/CBS Poll, 61% of the people questioned favored keeping our pollution laws "as tough as they are now," even if "some facilities might have to close." By a margin of 45% to 42%, a plurality of those questioned agreed with the even more vigorous statement that "protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost."[25] In the NBC News October 1981 National Poll, "protecting the environment" was favored over "keeping prices down" by a 52% to 37% margin.[26]

Pollster Louis Harris summarized the American public's feelings this way: "this message on the deep desire on the part of the American people to battle pollution is one of the most overwhelming and clearest we have ever recorded in our twenty-five years of surveying public opinion."[27]

The Army's policy is to be at the forefront of preserving and enhancing the environment. Army Regulation 200-1, "Environmental Protection and Enhancement," declares:

> Goal. It is the Department of the Army's goal to plan, initiate and carry out all actions and programs to minimize the adverse effects on the quality of the human environment without impairment to the Army's mission. Inherent in this goal is the requirement to achieve the following objectives:
>
> a. Eliminate the discharge of potentially harmful pollutants produced by Army activities.
>
> b. Conserve and wisely use natural and material resources provided for use throughout the Army.
>
> c. Maintain, restore, and enhance the natural and manmade environment in terms of its visual attractiveness and productivity.
>
> d. Demonstrate initiative and leadership in the formulation and execution of a program that contributes to the national goal of preserving and enhancing the environment.[28]

The Army has already made significant progress in pursuing these goals. For example, the Army leads the military services in its development of the Installation Restoration Program. Under this program, Army installations are scheduled for environmental attention, including records searchs, the conduct and analysis of preliminary surveys, technical design of remedial measures, and actual operation of remedial measures, if necessary.[29] The Army has spent approximately $40 million already to respond to environmental problems at Rocky Mountain Arsenal, a World War II vintage chemical munitions plant near Denver, Colorado.[30] Further remedial measures are under study. The Army has joined the EPA and the Justice Department in suing the Olin Cor-

---

are too high. Do you favor or expose relaxing pollution standards affecting human health if the costs are too high?" The poll was conducted between September 19 and 24, 1981.

[25] "Poll Finds Strong Support for Environmental Code," New York Times, October 4, 1981. The poll was conducted between September 22 and September 27, 1981.

[26] *See* NBC News, *Poll Results: October National Poll* (#71), November 10, 1981, p. 12. The complete question was "Sometimes laws that are designed to protect the environment cause industries to spend more money and raise their prices. Which do you think is more important: protecting the environment or keeping prices down?"

[27] Memorandum, *supra* note 23, at 7.

[28] AR 200-1, para. 1-4 (20 Jan. 1978).

[29] *Implementation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1981*, [sic] *Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong., 1st Sess. 156 (1981) (statement of George Marienthal, Deputy Assistant Secretary of Defense for Energy, Environment and Safety).

[30] Telephone discussion with William McNeill, Director of Technical Operations, Rocky Mountain Arsenal (April 13, 1982).

poration, a chemical manufacturer accused of polluting an area including Redstone Arsenal near Huntsville, Alabama.[31] In May 1981, the Army entered into a Memorandum of Understanding with EPA to provide Army cooperation in environmental research and development.[32] Similarly, in February 1982, the Army entered into a second agreement with EPA outlining construction and technical assistance to be provided by the Corps of Engineers in implementing Superfund nationwide.[33]

Despite efforts such as these, the Army is still criticized for insensitivity to the environment. Recent Congressional hearings led the Chairman of the Senate Environment and Public Works Committee, Senator Robert Stafford (R-VT), to summarize the testimony of witnesses from outside DoD: "[I]t certainly didn't sound as though Defense was doing much to monitor the possibility of migration of toxics from dumps or spills or doing anything on its own motion voluntarily to clean up possible dumpsites, spills, and so on."[34] The New York State Assembly Task Force on Toxic Substances charged that "[t]he disposal of toxic chemical wastes from Army and government-related chemical production in the Niagara Falls region contributed significantly to toxic contamination of Love Canal."[35] A recent expose accused the Army of "one of the most serious affronts to a rural watershed,"[36] involving "rampant pollution"[37] at Rocky Mountain Arsenal. It blames the Army for "thousands of tons" of DDT in or near the Tennessee River, from Redstone Arsenal.[38] In *Silent Spring*, the landmark 1962 book widely credited with helping to spark the modern environmental movement, Rachel Carson faulted Rocky Mountain Arsenal for actions to "poison wells, sicken humans and livestock, and damage crops."[39]

The Army's new authority under the Superfund legislation and implementing delegations provides a new opportunity to correct this image of environmental insensitivity. The Army now has the authority to investigate and initiate civil prosecution against those who damage natural resources on Army land.[40] By aggressively pursuing those who have polluted Army land, the Army can help to fulfill the goal of demonstrating initiative and leadership in environmental protection. Doing so will help to preserve the Army's resources in a period of budget austerity throughout the federal government. Would-be polluters in the future would take extra care if they realized the Army will take strong legal action.

What Kinds Of Pollution Does The Army Face?

Damage to the environment at Army installations may be broadly classified into four categories:

1. Damage caused by the Army itself.

2. Damage caused by private parties leasing

---

[31] United States v. Olin Corp., (Civ. No. CV80- PT-5300-NE, N.D. Ala., Filed Dec. 4, 1980).

[32] *Memorandum of Understanding Between Environmental Protection Agency and Department of the Army on Cooperative Research and Development*, AP-21-F-1-715-O, May 26, 1981.

[33] *Interagency Agreement Between the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency in Executing P.L. 95-510*, [sic] *The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)*, February 3, 1981. *See* 12 Env't Rep. (BNA) 1325 (Current Developments, Feb 19, 1981).

[34] *Hearings*, *supra* note 29, at 96.

[35] *The Federal Connection: A History of U.S. Military Involvement in The Toxic Contamination of Love Canal and the Niagara Frontier River* 39, ff (January 29, 1981).

[36] M. Brown, Laying Waste: The Poisoning of America by Toxic Chemicals 117 (Washington Square Press edition, 1981). The pollution occurred at Rocky Mountain Arsenal.

[37] *Id.* at 118.

[38] *Id.* at 114.

[39] (Fawcett Crest edition), 47, ff.

[40] Civil prosecution would be initiated by certifying the case to the Department of Justice, and then working closely with them in handling the litigation. *See* Exec. Order No. 12316, *supra* note 11, § 8(a).

land from the Army. An example is the pollution caused by DDT manufacturing operations on leased land at Redstone Arsenal, Alabama.[41]

3. Damage caused by private parties who enter onto an Army installation and pollute land without a lessor-lessee relationship. This could include a "midnight dumper," one who dumps hazardous waste on infrequently patrolled roads in order to avoid costly environmental safeguards. An example is the contamination of roads at Fort Bragg, North Carolina, with polychlorinated biphenyls (PCBs) by a midnight dumper in 1978.[42]

4. Damage caused by private parties occupying land near an Army installation, with pollution spilling over onto Army land. An example is the waste carried by the Nashua River onto Fort Devens, Massachusetts.[43]

Pollution in the first category is not susceptible to Army prosecution using the new Superfund civil liability. In cases where the Army itself has polluted, the Army must look to itself for remedial measures.

In other cases, however, such as those in Categories 2, 3, and 4 above, Army lawyers should consider using Superfund civil liability to assess damages against the polluters. The statute provides that sums recovered "shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal government."[44]

This new civil liability action is in addition to other causes of action which may be available.[45] For example, where the polluter is a private lessee on an Army installation, as in Category 2, the lease may provide an additional cause of action for clean up. To the Army as plaintiff, the Superfund cause of action offers the advantage of a standard of liability very similar to strict liability.

How Do Installation JAGs Fit In?

Installation lawyers are in key positions to assist the Army in remedying environmental damage through Superfund enforcement. Frequently, on-post officials have the best knowledge of environmental damage. When the pollution is a single dramatic incident, installation officials are usually the first to learn of it. When the pollution is the result of long-term gradual release, installation personnel may be the *only* Army officials with enough first-hand knowledge to realize that environmental quality is eroding. Among post officials, lawyers are in the unique position of combining knowledge of the pollution with legal awareness of remedies available, such as Superfund.

Staff judge advocates who suspect that pollution has occurred which is susceptible to Superfund enforcement should forward preliminary notice through command channels, and begin marshalling available information. In straightforward cases, on-post investigative

---

[41] *Engineering and Environmental Study of DDT Contamination of Huntsville Spring Branch, Indian Creek, and Adjacent Lands and Waters, Wheeler Reservoir, Alabama,* November 1980, Volume I, pp. 1-6. (Report prepared for U.S. Army Corps of Engineers, Mobile District, by Water and Air Research, Inc.). *See also* note 31, *supra,* and accompanying text.

[42] *See* Warren County v. North Carolina, 528 F. Supp. 276 (1981). *Cf.* "Sensors Join Fight Against Chemical Dumping, *Army Times*, Dec. 7, 1981, p. 52; U.S. EPA, Office of Water and Waste Management, *Everybody's Problem: Hazardous Waste* 21 (Pub. No. SW-826, 1980).

[43] *See* "Nashua River Cleanup," *Soldiers*, March 1982, at 14-15.

[44] CERCLA, *supra* note 1, § 107(f).

[45] Does the Superfund Act represent a legislative preemption of federal common law remedies? While the answer is not settled (*see* E. Warren & J. Smith, "The Defense of Hazardous Waste Enforcement Actions," *Envt'l Reg. Analyst*, Feb 1982, pp. 6, 7), a federal district court recently noted that "the comprehensive nature of the schemes established by the RCRA [Resource Conservation and Recovery Act] and the CERCLA require us to conclude that if federal common law ever governed this type of activity, it has since been preempted by those statutes." United States v. Price, 523 F. Supp. 1055, 1067 (1981).

and staff resources might be sufficient to prepare for Superfund litigation, as in any other installation legal action. In unusually complex or widespread instances of pollution, extensive expertise within the Army is available to assist. These include the U.S. Army Environmental Hygiene Agency, a part of the Health Services Command, and the U.S. Army Toxic and Hazardous Materials Agency, a part of the Materiel Development and Readiness Command (DARCOM).[46] Additionally, most Army commands have environmental officers on their staffs, coordinated in a network of environmental expertise headed by the Assistant Chief of Engineers.[47] In egregious cases, involving criminal liability for environmental offenses, the Federal Bureau of Investigation is available, and has targeted its resources to assist in thirty criminal pollution cases each year.[48] Depending on the circumstances, investigators of the Army's Criminal Investigation Command may also be available.

After an investigation report is assembled, it should be forwarded through command channels to the Office of The Judge Advocate General, for coordination with the Assistant Chief of Engineers. Next, a recommendation of whether to prosecute should be forwarded to the Office of the Secretary of the Army, for appropriate coordination with the Office of the Secretary of Defense.[49] Finally, if prosecution is desired, the case would be certified to the Department of Justice for litigation in consultation with the Department of the Army.[50]

Conclusion

Superfund presents the Army an opportunity to protect the environment and natural resources at Army installations. Staff judge advocates are in key positions to help the Army seize that opportunity.

[46] The Army Environmental Health Agency and the Army Toxic and Hazardous Materials Agency are headquartered at Aberdeen Proving Ground, Maryland.

[47] By regulation, the Chief of Engineers serves as the Environmentalist of the Army. AR 10-5, para 2-33(i). The address is HQDA, DAEN-ZCE, Washington, D.C. 20310.

[48] *See* 12 Env't. Rep. (BNA) 353 (Current Developments, July 10, 1981). *See also* EPA/FBI "Memorandum of Understanding," March 11, 1982. The FBI agrees to accept cases referred by EPA. Of course, requests for assistance should be forwarded through normal command channels, with expedited handling given the high priority of environmental enforcement. In the case of requests for investigation by the FBI, such a move should first be coordinated with the Office of The Secretary of the Army, for subsequent discussions with EPA and the FBI.

[49] *See* notes 22 and 23, *supra*, and accompanying text.

[50] *See* Exec. Order No. 12316, *supra* note 11, § 8(a).

Estelle v. Smith and the *Booker* Inquiry

by CPT Christopher Wilson, Office of the Staff Judge Advocate, Headquarters, 8th Infantry Division (Mech), Baumholder Branch

In *Estelle v. Smith*,[1] the Supreme Court considered the use of compelled psychiatric testimony at the sentencing phase of a capital murder trial. The defendant's statements had been used by the state to justify a death penalty by showing a probability that the defendant would constitute a continuing threat to society. In the military, it is not uncommon for a military judge to question an accused to establish the admissibility of records of nonjudicial punishment and summary court-martial convictions under *United States v. Booker*[2] and its proge-

[1] ___ U.S. ___, 101 S. Ct. 1886, 68 L. Ed. 2d 359 (1981).

[2] 5 M.J. 238 (C.M.A. 1977), *vacated in part*, 5 M.J. 246 (1977). Questions might include whether the accused was advised of his right to consult counsel, whether the

ny. In *United States v. Sauer*,[3] however, a court of military review found such questioning implicated the Fifth Amendment, based on *Estelle v. Smith*.[4] This article considers whether the Fifth Amendment allows an accused to refuse to answer judicial inquiries regarding the admissibility of past convictions and nonjudicial punishments.

In *Estelle v. Smith* the state ordered a psychiatric examination of Smith to determine Smith's capacity to stand trial, though the defense had not put competency or mental responsibility in issue. Without giving *Miranda* warnings, the state psychiatrist examined Smith alone for approximately 90 minutes while Smith was in the county jail. Smith was then tried by a jury and convicted of murder. During a subsequent sentencing proceeding, the state called the psychiatrist who conducted the competency examination to testify in rebuttal to testimony introduced by Smith. Over defense objection, the pyschiatrist testified regarding the dangerousness of the defendant, based on the compentency examination. After deliberation, the jury delivered a sentence of death.

The state argued before the Supreme Court that the Fifth Amendment was inapplicable because "'incrimination is complete once guilt has been adjudicated.'"[5] The Court disagreed saying: "The essence of this basic constitutional principle is 'the requirement that the State which proposed to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'"[6] The Court went on to hold:

> A criminal defendant, who neither initiates a pyschiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness.[7]

Because the state had improperly used the defendant's statements to justify a death penalty (by showing future dangerousness), the death sentence was vacated. The Court did *not* hold that *no* interviews or examinations would be proper. In fact, the Court specifically noted that if the psychiatric evaluation had been for the "limited, neutral purpose" of determining competence to stand trial "no Fifth Amendment issue would have arisen."[8]

The *Smith* case may usefully be compared and contrasted with *United States v. Booker*.[9] In that well-known case, the accused was convicted to assault and battery. On appeal, the defense argued that two prior summary court-

---

accused waived his right to a special court-martial in writing, whether an appeal is pending, and similar foundational questions.

[3] 11 M.J. 872 (N.M.C.M.R. 1981). The court reasoned that:

> The essence of the basic constitutional principle that no person shall be compelled in any criminal case to be a witness against himself is the requirement that the Government which proposes to convict *and punish* an individual produce the evidence by the independent labor of its own officers, not by the simple, cruel expedient of forcing it from his own lips.

Id. at 874 (emphasis in original). The court held that "[a]ny effort to compel an accused to testify against his will at the sentencing hearing clearly contravenes the Fifth Amendment." *Id.* On 5 October 1981, the Judge Advocate General of the Navy certified this issue to the Court of Military Appeals. 12 M.J. 86 (C.M.A. 1981).

[4] *Accord*, United States v. Taylor, SPCM 15697 (A.C.M.R. 3 September 1981) (unpublished).

[5] 68 L. Ed.2d at 368.

[6] *Id.* (*quoting* Culombe v. Connecticut, 367 U.S. 568 (1961) (opinion announcing the judgment) (emphasis in *Smith*)).

[7] *Id.* at 372.

[8] *Id.* at 370.

[9] *See* note 2 *supra*.

martial convictions were improperly utilized by the trial judge to sustain an increase in the authorized punishment under the "escalator clause" of Section B of paragraph 127c of the Manual for Courts Martial. The defense maintained, based on *Middendorf v. Henry*,[10] that the results of the summary court-martials were not "convictions." The Court of Military Appeals agreed in part, saying:

> [T]he individual to be disciplined must be told of his right to confer with an independent counsel before he opts for disposition of the question at either of the above levels. [Nonjudicial punishment or summary court-martial.] Absent compliance with this proviso, evidence of the imposition of discipline under either is inadmissible in any subsequent trial by court-martial.[11]

The court believed such a rule, and certain other rules, were necessary "in order to give some meaning to the due process guarantees of the Fifth Amendment."[12] In explaining how the necessary facts should be ascertained, the court said: "If the exhibit [the record of nonjudicial punishment or summary court-martial conviction] does not affirmatively establish a valid waiver, the trial judge must conduct an inquiry *on the record* to establish the necessary information."[13] By implication, the court held that an accused could properly be required to respond to judicial inquiries regarding prior convictions on nonjudicial punishment, at least in a guilty plea case. This implicit holding was subsequently confirmed in *United States v. Spivey*[14] where the court held that statements may properly be required in a guilty plea case over defense objection based on a self-incrimination clause of the Fifth Amendment.[15]

If *Booker* and *Spivey* are still good authority, in view of *Smith*, then it seems clear that the Fifth Amendment does not allow an accused to refuse to answer judicial inquiries regarding past convictions and nonjudicial punishment, at least in a guilty plea case. On the other hand, if *Smith* is inconsistent with *Booker* and *Spivey*, then an accused may have a Fifth Amendment right to refuse to answer the military judge's questions. A good argument can be made that *Booker* and *Spivey are* consistent with *Smith* and so not affected by that Supreme Court opinion. In *Smith*, the defendant's statements were "devastating" evidence used to justify a death penalty.[16] The statements related to the particular crime for which the defendant was being sentenced, not some prior offense. The statements were made to a state psychiatrist while the defendant was alone in a county jail, not in court with his attorney. And, perhaps most importantly, the statements were presented to the *jury* to justify a death sentence, not to the judge for a mere preliminary determination of admissibility. By contrast, a military judge's inquiry is used to check on fairness by the government in prior proceedings, and to justify use of a minor conviction or punishment which may or may not affect the determination of a court-martial sentence. The responses, if any, relate to *prior* proceedings, rather than the crime for which the accused is being sentenced. The responses are made in open court, to a judge's inquiries, and are generally made with counsel present. And finally, the responses are presented to the

---

[10] 425 U.S. 25 (1976).

[11] 5 M.J. at 243.

[12] *Id.*

[13] *Id.* at 244 (emphasis in original).

[14] 10 M.J. 7 (C.M.A. 1980). The majority position suggests that the type of plea is immaterial, though Chief Judge Everett would allow a judicial inquiry only where a guilty plea has been accepted. *Id.* at 9. In *Spivey*, however, the accused pled guilty so the Court of Military Appeals may not be as bound by its prior decision as if the plea had been not guilty. Hence it is possible that the court may adopt Chief Judge Everett's view if it finds the *Sauer* opinion persuasive, with the result that unfettered judicial inquiry would still be allowed in a guilty plea case.

[15] The applicability of *Booker* to Article 15 proceedings was confirmed in *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979), and *United States v. Barlow*, 9 M.J. 214 (C.M.A. 1980).

[16] 68 L. Ed.2d at 367.

military judge for a preliminary finding of admissibility, not to the members as justification for a death sentence. Hence, because of the substantial differences between *Smith* and *Booker*, it may be determined that the *Booker* inquiry is not one which compels a criminal defendant to be "witness against himself."[17] Rather, it may be one of the "types of ... examinations that [may properly] be ordered or relied upon to inform a sentencing determination."[18]

On the other hand, there is also a good argument that *Smith* is inconsistent with *Booker* and *Spivey*. In *Smith*, the state improperly failed to produce evidence against the defendant "by the independent labor of its officers."[19] The same shortcoming is present when a trial counsel relies solely on a military judge's inquiry to determine the admissibility of summary court-martial convictions or nonjudicial punishment. In *Smith* the information was used to allow a psychiatrist to give testimony regarding "future dangerousness." Likewise, a military judge's inquiry is used to allow the admission of testimony or real evidence regarding general culpability. In *Smith* the defendant faced a form of the "cruel trilemma of self-accusation, prejury or contempt."[20] Likewise, a military judge's inquiry presents an accused with essentially the same "cruel trilemma." Finally, in *Smith*, the defendant was exposed to mental coercion in being required to undergo psychiatric evaluation. Likewise, when a military judge presents questions to which the accused must respond, perhaps to his detriment, the accused is being subjected to mental coercion. Hence the military judge's inquiry implicates several of the same Fifth Amendment concerns that were at issue in *Smith*, but were discounted in *Booker* and *Spivey*.

Although there are good arguments on both sides, it seems proper under the Fifth Amendment to require an accused to respond to a military judge's inquiries regarding the admissibility of past convictions and nonjudicial punishment in most cases. The judge's inquiry is for the "limited, neutral purpose" of determining whether prior convictions were properly obtained or nonjudicial punishment properly imposed. It is not an inquiry with the broad, partisan objective of determining future dangerousness or general culpability. It is probably as "limited" and "neutral" as a competency inquiry, which is expressly sanctioned in *Smith*. It relates to prior proceedings, is conducted in open court by a judge, is generally conducted with counsel present, and is conducted for the benefit of the military judge, rather than for the members. Although the judicial inquiry does implicate Fifth Amendment values to some degree, as do all forms of required disclosure, the inquiry does not seem sufficiently unfair or unreasonable to warrant recognition of a Fifth Amendment privilege in all cases. Where the death penalty is at issue, however, and there is an unusually high need for reliability and fairness (because of the finality of an execution), it may be proper to recognize a privilege. Likewise, in a case where a trial counsel is *actually* relying on the judge's inquiry as a "simple, cruel expedient" and is refusing to expend a reasonable amount of "independent labor" to find other evidence of admissibility, it may be appropriate to recognize a privilege. In the remainder of cases, however, a proper interpretation of the Fifth Amendment probably does not require recognition of a privilege to refuse to answer the judge's questions regarding the admissibility for sentencing purposes of prior summary court-martial convictions or nonjudicial punishment.

---

[17] U.S. Const., Amend. V.

[18] 68 L. Ed.2d at 373 n.13.

[19] *Id.* at 368.

[20] *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

Legal Assistance Items

Major Joel R. Alvarey, Major Walter B. Huffman, Major John F. Joyce, Captain Timothy J. Grendell, and Major Harlan M. Heffelfinger
Administrative and Civil Law Division, TJAGSA

Survivor Benefits—*Failure To Notify Spouse IAW Statute Voids Survivor Benefit Plan Election. Barber v. United States, No. 132-80C (Ct. Cl., Apr. 7, 1982).*

Since its enactment in 1972 the Survivor Benefit Plan (SBP) has contained a provision requiring that a servicemember's spouse be notified in writing if the servicemember elects less than maximum coverage for the spouse under the plan. Because the statute provides no specific legal remedy for a violation of the notification requirement, it has been assumed the provision's only value was to make spouses aware of their servicemember-spouses' actions, thereby allowing the spouse to engage in self-help remedial action in the family setting. A recent decision by the Court of Claims, however, has interpreted the notification provisions to have legal significance.

SGT Charles Barber had originally elected full coverage for his wife and child under SBP, but the day before he retired he executed a second election providing for no participation in the plan. When SGT Barber died about a year later, the Air Force refused Mrs. Barber any payment under SBP because of the second election. Mrs. Barber challenged that decision, exhausted her administrative remedies, and brought suit in the Court of Claims. As stated by the court, the gist of Mrs. Barber's (and her daughter's) position was that:

> SGT Barber's attempt to elect out of the Survivor Benefit Plan was improperly effected because they were never notified of his intentions. According to plaintiffs, since the plan provides for automatic coverage of the spouse and dependent children unless an election not to participate is made and since notice to the spouse of such an election is statutorily required, failure to give notice invalidates the election and restores full coverage under the plan.

The government defense to Mrs. Barber's theory was twofold. First, the defense argued the court should not imply a remedy where none was specifically stated in the statute. Second, the government asserted written notice had been given to Mrs. Barber as required. The court rejected both defenses. According to the court, the legislative history of the SBP showed the purpose of the notice requirement is to prevent financial adversity from befalling people such as Mrs. Barber through neglect or misunderstanding. Thus, the court concluded violations of the notice requirement must invalidate elections adverse to the spouse, for otherwise the requirement is meaningless.

As to the government's second defense, the court noted the only witness on the issue of whether written notice was sent stated it was his normal practice to send notice in such cases, but he was unable to produce a file copy of the notice to Mrs. Barber. Without the file copy (which the witness also stated it was his normal practice to retain) the court accepted Mrs. Barber's contention that notice was not given. Thus, the court held Mrs. Barber and her daughter are entitled to full coverage under SBP retroactive to the date of SGT Barber's death.

Estate Assets Inventory Format

A primary problem encountered by the surviving spouse of a servicemember is locating and inventorying the deceased servicemember's assets and personal documents (*e.g.*, will, insurance policies, etc.). A prolonged search for these assets and documents increases the surviving spouse's anxiety and wastes time and money. Legal assistance officers can help their clients to avoid post-mortem family problems through the use of a preventive legal measure—an estate assets inventory format.

Captain Gregory Taylor, Chief of Legal As-

sistance at Aberdeen Proving Ground, has developed an effective personal assets inventory format for legal assistance clients. This format allows the client to record the location of personal assets and documents so that the surviving spouse and/or executor can quickly locate the estate's assets. Captain Taylor suggests that the client complete this format form at the time he or she executes a will, and keep the format with the will. Clients also should be advised to update the format form periodically.

Captain Taylor's format is an example of effective preventive legal assistance. It is reproduced below for use as appropriate by Army legal assistance offices.

Where My Assets Are

For: _____

Social Security No. _____

Employer: _____

My valuable papers and assets are stored in these locations:

A. Residence _____
(Address, plus where to look)

B. Safe-Deposit Box _____
(Bank) (Address)

C. Office _____
(Address)

D. _____

E. _____

F. _____

Location Letter — *Item*

____ My will (original)
____ My will (copy)
____ Powers of attorney
____ My burial instructions
____ Cemetery plot deed
____ Spouse's will (original)
____ Spouse's will (copy)
____ Spouse's burial instructions
____ Document appointing children's guardian
____ Handwritten list of special bequests
____ Safe combination, business
____ Safe combination, home
____ Trust agreements
____ Life insurance, group
____ Life insurance, individual
____ Other death benefits
____ Property and casualty insurance
____ Health insurance policy
____ Homeowner's insurance policy
____ Car insurance policy
____ Employment contracts
____ Partnership agreements
____ List of checking and savings accounts
____ Bank statements, canceled checks
____ List of credit cards
____ Certificates of deposit
____ Checkbooks
____ Savings passbooks
____ Record of investment securities
____ Brokerage account records
____ Stock certificates
____ Mutual fund shares
____ Bonds
____ Other securities
____ Corporate retirement plan
____ Keogh or IRA plan
____ Annuity contracts
____ Stock-option plan
____ Stock purchase plan
____ Profit-sharing plan
____ Income and gift tax returns
____ Titles and deeds to real estate and land
____ Title insurance
____ Rental property records
____ Notes and other loan agreements, including mortgages
____ List of stored and loaned valuable possessions
____ Auto ownership records
____ Boat ownership records
____ Birth certificate
____ Citizenship papers
____ My adoption papers
____ Military discharge papers
____ Marriage certificate
____ Children's birth certificates
____ Children's adoption papers
____ Divorce/separation records
____ Names and addresses of relatives/friends
____ Listing of professional and fraternal organization memberships

Other:

___ _____

___ _____

___ _____

___ _____

Important Names, Addresses, and Phone Numbers

Lawyer: _____

Accountant: _____

Stockbroker: _____

Insurance Agent(s): _____

_____

Date prepared: _____

Copies given to: _____

_____

Suggestions for Improving the Legal Assistance Program

The Legal Assistance Branch, The Judge Advocate General's School, welcomes suggestions for improving the Legal Assistance Program from judge advocates. The Branch will publish these suggestions for the benefit of all legal assistance officers. Mail suggestions to The Judge Advocate General's School, US Army, Administrative & Civil Law Division, Legal Assistance Branch, Charlottesville, VA 22901.

A Matter of Record

Notes from Government Appellate Division, USALSA

Charges and Specifications

Article 123a, Uniform Code of Military Justice, proscribes a wide range of activities related to bad check offenses. The gravamen of an offense under a worthless check statute is the intent to defraud and the offense is complete when the check or order is made or uttered with the requisite intent and knowledge. While personal money orders are not, in a commercial sense, the same as personal checks or drafts, many civilian jurisdictions treat personal money orders as the equivalent of personal checks and drafts for the purposes of their worthless check statutes. The Army Court of Military Review in *United States v. Pace*, SPCM 16586 (ACMR 17 March 1982), followed the lead of the civilian jurisdictions and held that personal money orders may properly be the subject of a bad check offense under Article 123a, Code.

Post-Trial Delays

In *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979), the Court of Military Appeals abandoned the rule announced in *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974), which required the dismissal of charges in cases where the appellant was in post-trial confinement for more than 90 days prior to the convening authority's action and the government was unable to meet its heavy burden to show diligence in the processing of the case. In *Banks* the court found that the inflexible application of this rule was no longer required and that in the future, delays in taking final action would be tested for prejudice. *See United States v. Gray*, 22 C.M.A. 443, 47 C.M.R. 484 (1973). In recent months, several military courts of review have commented on delays in the post-trial processing of specific cases and warned that these lengthy delays might bring a return to the *Dunlap* rule. While the Court of Military Appeals has not yet gone that far, recently in a case with a lengthy post-trial delay, the court granted review on the issue of whether the court should reimpose the *Dunlap* rule. Care should be taken to insure speedy post-trial processing, and all unusual delays should be documented.

Judiciary Notes

Initial Court-Martial Orders

a. Effective 1 August 1981, trial counsel have been authorized to introduce evidence of prior civilian convictions of an accused. *See* DA Message 291700 July 1981. Accordingly, initial promulgating orders should reflect the number of previous convictions considered by the court, whether military or civilian.

b. According to paragraph 12-4*b*(3)(*j*), AR 27-10, the initial promulgating order should show the date on which an acquittal is announced by the court. The date should also be shown when proceedings are terminated by a grant of a motion for a finding of not guilty, by a declaration of a mistrial, dismissal of charges, or other disposition of charges.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Selection and Training of Military Court Reporters. It has become necessary for us to reevaluate the selection process for military court reporters because of the dropout rate from the court reporter course. To this end, more restrictive entry prerequisites will be imposed for soldiers attending the court reporter course at the Naval Justice School. The requirements will include a high school diploma or GED equivalent, a CL score of 110, the ability to type 40 words per minute, a firm grasp of English grammar, punctuation, etc., and most importantly, the favorable recommendation of a staff judge advocate based on a personal interview.

The involvement and assistance of staff judge advocates, chief clerks and senior court reporters in the selection process is essential. There is no substitute for a personal assessment based upon a face-to-face interview. I urge all chief clerks personally to assume this responsibility and to be comprehensive and candid in making recommendations so that the best qualified are selected.

It is equally important that chief clerks identify individuals presently holding PMOS 71E who, by their substandard performance or failure to maintain proficiency, are no longer qualified to perform duties as court reporters. Such individuals should be considered for reclassification to another MOS. The reclassification process constitutes the primary means of removing the "dead wood" so that other highly qualified persons can enter the career field.

It is important to recognize that while new graduates of the Naval Justice School typically arrive at field installations with great enthusiasm and excellent training, they are not "finished products." It is the responsibility of chief clerks and senior court reporters to supervise and report their professional development to the staff judge advocates. It is essential to assure that recent graduates are utilized as court reporters and exposed to the complete spectrum of court reporting duties. Relegating new military court reporters to clerical or administrative duties, while relying upon their more experienced military or civilian colleagues to handle the caseload, is not conducive to professional development and is frustrating to the new court reporter.

We should consider the establishment and maintenance of a corps of highly skilled soldier court reporters a matter of utmost importance which directly affects the quality of the administration of military justice. Staff judge advocates, chief clerks and senior court reporters should be increasingly involved in the attainment of this objective.

2. NCOES Advanced Correspondence Course.

The purpose of the Adjutant General NCOES Advanced Correspondence Course is to provide selected enlisted personnel with a working knowledge of the duties required to perform as NCO's in the grade of E8 and E9. E5's who are on a standing promotion list to E6, E6's and E7's, are eligible. I urge all NCO's who meet the prerequisites and have not taken the Resident NCOES Course to enroll in it for career enhancement. The course consists of 48 subcourses for a total of 362 credit hours. The course is administered by the Army Institute for Professional Development, U.S. Army Training Support Center, Newport News, Virginia 23628. The point of contact for this course (Course S–18) is Mrs. Pat Graham, Autovon: 927-4674.

3. Promotion Pointout Cutoff Scores for Overstrength MOS. In the past, soldiers on standing promotion lists were promoted with regard to worldwide vacancies in their MOS if they achieved cutoff scores of 801 or 886 for promotion to E5 or E6, respectively. In 1981, 7 percent of the promotions to E5 and E6 went to soldiers in overstrength MOS. As a result of this, bringing shortage MOS up to authorized E5 and E6 strength levels was hampered, especially in the combat arms skills. Promotion cutoff scores for 1 Jan 82 were established as 999 in those MOS projected to be *at* or *over* 100 percent strength. This action has resulted in a widespread perception that there will be no opportunity for promotion now or in the future for many MOS. This is not the case.

Promotion cutoff scores were established for 1 Feb 82 by reviewing each overstrength MOS and, where necessary, adjusting the cutoff scores to compensate the MOS structure discrepancies and to insure promotion opportunities for all MOS.

A new reporting system will be implemented during the April–June timeframe that will provide individual promotion point scores instead of groupings of scores as is now the case. This action will permit identification of the top score in each MOS and continuation of a policy of promoting the most outstanding soldiers, regardless of MOS vacancies. This will be achieved by adjusting the cutoff score to coincide with the desired number of promotions in each overage MOS.

The U.S. Army Military Personnel center will identify selected soldiers in overage skills and advise them of opportunities (promotion, training, selective reenlistment bonus) available to those who desire to seek reclassification into shortage skill MOS.

American Bar Association Young Lawyers Division Midyear Meeting

By Captain Jan W. Serene, ABA/YLD Delegate
Administrative Law Division, OTJAG

The American Bar Association (ABA) Young Lawyers Division (YLD) held its 1982 Midyear Meeting in Chicago, Illinois, on 20–27 January 1982. Following is a brief summary of business conducted at that meeting which is of interest to military practitioners.

The primary business of the Midyear Meeting was discussion of the format and content of the proposed Model Rules of Professional Conduct. The ABA Commission on Evaluation of Professional Standards (The Kutak Commission) has drafted and proposed two alternative drafts. The so-called "white draft," which is preferred by the Kutak Commission and was endorsed at the Midyear Meeting by the YLD, is in a format similar to the American Law Institute's restatements and modern codes such as the Uniform Commercial Code. Each rule states a principle and is followed by comments and notes comparing the draft with related provisions in the Model Code of Professional Responsibility, citing the legal background for the rule, and including a discussion of relevant authorities. The second or "blue draft" is in the same format as the current Code of Professional Responsibility, using canons, ethical considerations, and disciplinary rules. Comments and

notes similar to those in the "white draft" are included.

After endorsing the "white draft" or restatement format the YLD commented on a number of the rules contained in the proposed Model Rules of Professional Conduct. The Division proposed a amendment which would incorporate the current DR 5-107(B) directive that a lawyer, when paid by a third party, not permit that third party to direct his course of action. The division further endorsed several provisions as currently drafted, namely:

a. Rule 1.1 which requires a lawyer to assume only work he or she is competent to do.

b. Rule 1.3 which requires a lawyer to act with reasonable promptness and diligence in representing a client,

c. Rule 1.4 which requires a lawyer to keep the client informed and to give the client sufficient information to permit informed decisions,

d. Rule 1.10 which provides that associates of a lawyer disqualified by a conflict of interest are also disqualified unless the affected client consents,

e. Rule 1.7 prohibiting conflicts of interest,

f. Rule 3.5 which prohibits unlawful *ex parte* contacts, and unlawful means of influencing judges and juries, and conduct intended to disrupt a tribunal,

g. Rule 3.7 prohibiting a lawyer from acting as advocate where likely to be a witness, with exceptions already present in the Code,

h. Rule 4.2 prohibiting communication with parties known to be represented by counsel,

i. Rule 4.3 requiring a lawyer to make clear to unrepresented persons that he or she is not impartial,

j. Rule 4.4 prohibiting tactics designed only to "embarrass, delay, or burden a third person" and prohibiting obtaining evidence in violation of third persons' rights, and

k. Rule 6.1 encouraging lawyers to provide *pro bono* services.

The proposed Model Code of Professional Conduct is scheduled for full consideration and possible adoption at the ABA Annual Convention in San Francisco, California, in August 1982. When, and if, the Model Code is approved by the ABA, action would be required by each of the several states and Armed Forces to make it binding on each jurisdictions' attorneys.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

June 7-11: 67th Senior Officer Legal Orientation (5F-F1).

June 14-17: Claims Training Seminar (U.S. Army Claims Service).

June 21-July 2: JAGSO Team Training.

June 21-July 2: BOAC (Phase VI-Contract Law).

July 12-16: 4th Military Lawyer's Assistant (512-71D/20/30).

July 19-23: DAJA-IA Law of War Symposium.

July 19-August 6: 25th Military Judge (5F-F33).

August 2-6: 11th Law Office Management (7A-713A).

August 9-20: 93d Contract Attorneys (5F-F10).

August 16-May 20, 1983: 31st Graduate Course (5-27-C22).

August 23-27: 6th Criminal Trial Advocacy (5F-F32).

September 1-3: 6th Criminal Law New Developments (5F-F35).

September 13-17: 20th Law of War Workshop (5F-F42).

September 20-24: 68th Senior Officer Legal Orientation (5F-F1).

October 5-8: 1982 Worldwide JAGC Conference.

October 13-15: 4th Legal Aspects of Terrorism (5F-F43).

October 18-December 17: 99th Basic Course (5-27-C20).

October 18-21: 5th Claims (5F-F26).

October 25-29: 7th Criminal Trail Advocacy (5F-F32).

November 1-5: 21st Law of War Workshop (5F-F42).

November 2-5: 15th Fiscal Law (5F-F12).

November 15-19: 22d Federal Labor Relations (5F-F22).

November 29-December 3: 11th Legal Assistance (5F- F23).

December 6-17: 94th Contract Attorneys (5F-F10).

January 6-8: Army National Guard Mobilization Planning Workshop.

January 10-14: 1983 Contract Law Symposium (5F-F11).

January 10-14: 4th Administrative Law for Military Installations (Phase I) (5F-F24).

January 17-21: 4th Administrative Law for Military Installations (Phase II) (5F-F24).

January 17-21: 69th Senior Officer Legal Orientation (5F-F1).

January 24-28: 23d Federal Labor Relations (5F-F22).

January 24-April 1: 100th Basic Course (5-27-C20).

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16–20: 11th Methods of Instruction.

June 6–10: 71st Senior Officer Legal Orientation (5F–F1).

June 13–17: Claims Training Seminar (U.S. Army Claims Service).

June 20–July 1: JAGSO Team Training.

June 20–July 1: BOAC: Phase II.

July 11–15: 5th Military Lawyer's Assistant (512–71D/20/30).

July 13–15: Chief Legal Clerk Workshop.

July 18–22: 9th Criminal Trial Advocacy (5F–F32).

July 18–29: 97th Contract Attorneys (5F–F10).

July 25–September 30: 101st Basic Course (5–27–C20).

August 1–5: 12th Law Office Management (7A–713A).

August 15–May 19, 1984: 32nd Graduate Course (5–27–C22).

August 22–24: 7th Criminal Law New Developments (5F–F35).

September 12–16: 72nd Senior Officer Legal Orientation (5F–F1).

October 11–14: 1983 Worldwide JAG Conference.

October 17–December 16: 102nd Basic Course (5–27–C20).

3. Civilian Sponsored CLE Courses

June

25–26: ATLA, Military Law Seminars, Marine Corps Air Station, Cherry Point, NC.

August

1–5: NJC, Criminal Law—Graduate, Reno, NV.

2–6: SNFRAN, The Skills of Contract Administration, Vail, CO.

4–6: MOB, Missouri Practical Skills, St. Louis, MO.

5–6: ALEHU, Family Law, Bloomington, MN.

8–17: MCLNEL, Trial Advocacy Institute, Boston, MA.

11–13: MOB, Missouri Practical Skills, Kansas City, MO.

11–13: PBI, Pennsylvania Legal Practice, Carlisle, PA.

30–9/1: NYULS, Bankruptcy & Business Reorganization VIII, New York, NY.

30–9/2: NYULS, Graduate Tax Workshop

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717),

Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338- 1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law,

University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations

Number	*Title*	*Change*	*Date*
AR 15-185	Army Board for Corrections of Military Records	1	1 May 82
AR 190-30	Military Police Investigations	902	8 Apr 82
AR 210-7	Commercial Solicitation on Army Installation	2	15 Apr 82
AR 230-2	Personnel Policies and Procedures	3	1 May 82
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program	901	27 Apr 82
AR 600-200	Enlisted Personnel Management System	908	25 Mar 82
AR 600-200	Enlisted Personnel Management System	909	8 Apr 82
AR 601-337	The Army General Counsel's Honor Program		15 Apr 82
AR 621-100	Promotion of Officers on Active Duty		1 May 82
AR 635-200	Enlisted Separations	903	29 Mar 82

2. Articles.

Dienstag, Abbe L., Comment: *Fedorentio v. United States:* War Crimes, the Defense of Duress, and American Nationality Law, 82 Colum. L. Rev. 120 (1982).

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may get this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative yearly indices are provided users. TJAGSA publications may be identified for ordering purposes through these. Also, recently published titles and the identification numbers necessary to order them will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER TITLE

AD B063185 Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-81-1

AD B063186 Criminal Law, Procedure, Trial/JAGS-ADC-81-2

AD B063187 Criminal Law, Procedure, Posttrial/JAGS-ADC-81-3

AD B063188 Criminal Law, Crimes & Defenses/JAGS-ADC-81-4

AD B063189 Criminal Law, Evidence/ JAGS-ADC-81-5

AD B063190 Criminal Law, Constitutional Evidence/JAGS-ADC-81-6

Those ordering publications are reminded that they are for government use only.

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General

☆ U.S. GOVERNMENT PRINTING OFFICE: 1982: 361-809/110